No. 20,428

United States
COURT OF APPEALS
for the Ninth Circuit

ARTHUR ANDERSON and CLATSOP FISHERIES, INC., an Oregon corporation,

Appellants,

v.

GENE R. NADON, DOROTHY IRENE NADON, and JATABORO CORPORATION, a corporation,

Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

KRAUSE, LINDSAY & NAHSTOLL,
JERRARD S. WEIGLER,
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Proctors for Appellees.
MAUTZ, SOUTHER, SPAULDING,
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TABLE OF CASES

In accordance with the provisions of Rule 23(5) of the Rules of this Court, appellees request the case be reheard en banc because of the importance of the question presented by this petition insofar as it affects correct judicial procedure.

The Question Presented on Appeal Was Whether or Not The Court Below, Acting on The Record Before It, Did or Did Not Abuse Its Discretion

In this maritime limitation of liability proceeding, appellants had attempted to convert what was concededly a multiple claim-inadequate fund case into a single claim-inadequate fund case, so as to permit dissolution of the District Court's injunction against other proceedings and commence a state court action against appellees. In so doing, appellants filed documents variously designated as "disclaimers," "releases," and a "priority consent." In addition they relied upon a theory of "trusteeship" for crewmen's claims, attempted to waive the res judicata effect of any state court judgment in certain respects, and offered to (but did not) abandon the three individual claims previously asserted.

Upon submission for decision and careful consideration of the record, the trial judge declined to dissolve the injunction (R. 29). In so doing it exercised the sound discretion which should be "invoked as a guide to judicial action" in cases of this kind. *Langnes* v. *Green,* 1931, 282 U.S. 531, 541, 51 S. Ct. 243, 75 L. Ed. 520.

On this appeal, the scope of appellate review is limited to determining whether or not there was abuse of discretion or an improvident exercise thereof by the

court below. *Delno* v. *Market Street Ry. Co.,* 9th Cir., 1942, 124 F.2d 965; *Bowles* v. *Huff,* 9th Cir. 1944, 146 F.2d 428, 431; *Cf., Ex Parte Green,* 1932, 286 U.S. 437, 52 S. Ct. 602, 76 L. Ed. 1212.

District Court's Decision Correct on the Record Presented

This Court's opinion concedes that appellants had not effectively converted this matter into a single claim case when their motion was submited for decision by the District Court (Op. 8). Clearly that decision was correct on the facts presented but this Court has now permitted appellants to reopen the matter and make a further attempt to achieve their purpose.

Due to the infinite variety of fact situations which may arise in a maritime catastrophe, the decision as to whether an appropriate case has been presented for dissolution of the statutory injunction in any given instance is peculiarly one for the District Court which is in the best position to review the facts and control the proceedings. Each case presents a different set of circumstances and claims. See, e.g. *Petition of Republic of South Korea,* D.C. Or. 1959, 175 F. Supp. 732.

In this case, on the record before it, the District Court properly declined to dissolve its injunction and hence the sole question on appeal was whether such decision constituted an abuse of discretion. *Langnes* v. *Green,* supra; *New Albany Waterworks* v. *Louisville Banking Co.,* 7th Cir. 1903, 122 Fed. 776, 782. It has not been suggested in any way that the District Court abused or improvidently exercised its discretion; nor is such the case.

Remand With Instructions as to The Manner in Which Court Below Should Exercise Its Discretion on a Hypothetical State of Facts Is Wholly Beyond the Power of This Court

In its opinion of March 30, 1966 this Court held:

> "* * * that if, on the remand of this cause, Clatsop abandons on the record any cliams asserted as trustee or assignee of Linville and Winters, and Anderson abandons on the record his personal claim, an exercise of sound discretion will require the district court to dissolve the injunction sufficient to enable Clatsop to proceed with an action in the courts of Oregon on its claim for the loss of the BETTY." (Op. 8-9)

Such a holding goes beyond the scope of judicial review and seeks to circumscribe the District Court's function in exercising its discretion upon the remand of this case for further proceedings. Heretofore, it has been the rule that such directions will issue from this Court only in the form of a writ of mandamus to be granted when the lower court has acted in excess or abuse of its discretion. *United States* v. *Hester,* 9th Cir., 1963, 325 F.2d 654; *Frost* v. *Yankwich,* 9th Cir., 1958, 254 F.2d 633.

In the case at bar appellees had, as noted, sought by various devices to reduce the previously asserted claims to a single claim. Judge Kilkenny evidently concluded that they had not effectively done so and

> "* * * having considered the offers of said petitioners (Anderson, et al), and being of the belief that an allowance of said motion would not conform to the statutory scheme as created by Congress in connection with the exoneration from, or

> limitation of liability, in admiralty cases as interpreted, and in my opinion, properly construed in *Pershing Auto Rentals, Inc.* v. *Gaffney,* 279 F.2d 546 (5th Cir. 1960), and the Court being now fully advised, * * *" (R. 29)

denied appellants' motion to dissolve the injunction.

This court's opinion, however, allows appellants to make further efforts to reduce the number of claims and purports to control exercise of the District Court's discretion if and when suggested future steps are taken by appellees herein. Such an order is wholly beyond the power of this Court and appellees respectfully suggest that the same should be withdrawn.

Should this Court determine that appellants are entitled to take further steps in their effort to reduce the number of claims, the case should be remanded for that purpose without limitation upon the District Court's power to redetermine the matter on the basis of the supplemental record, the facts and the law. *Kontos* v. *The SS SOPHIE C,* 3rd Cir. 1961, 288 F.2d 437.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL
JERARD S. WEIGLER
MAUTZ, SOUTHER, SPAULDING,
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Proctors for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules, and I further certify that in my judgment the foregoing Petition for Rehearing is well founded and not interposed for delay.

JERARD S. WEIGLER
Of Attorneys for Appellees